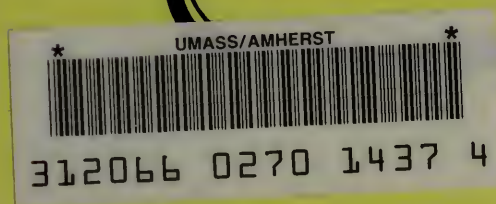


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Employment Discrimination Against People With Disabilities



How to Fight Back In Massachusetts

A Self-help Manual

GOVERNMENT DOCUMENTS
COLLECTION

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By Ernest Winsor and others

This manual is a work product of the Coalition for the Legal Rights of the Disabled and the Massachusetts Disability Law Support Project. While it was written mainly by a lawyer at the Massachusetts Law Reform Institute (MLRI), a great deal of help came from lawyers elsewhere, especially William G. Crane and Stanley J. Eichner, then both of the Disability Law Center, Monica Halas and Lynn Girton of Greater Boston Legal Services, and Jody Williams of the Massachusetts Developmental Disabilities Council (MDDC). The final composition, layout and printing of the first edition of the pamphlet were paid for by the MDDC, and MDDC paid for the printing of this second edition. Design and layout for the 1st edition was by Marshall T. Spriggs of the Massachusetts Poverty Law Center and for the 2d edition by Annette Duke of MLRI.

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The terms "disability" and "handicap" are used interchangeably in this Manual. Although the authors are aware that "disability" is the term most preferred by the community, many of the statutes and regulations still use the term "handicap," necessitating the use of that term for accuracy.

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INTRODUCTION

In March, 1984, Massachusetts got a new law protecting people with disabilities from being discriminated against in employment. A state agency, the Massachusetts Commission Against Discrimination, was made the enforcement agency to help people with discrimination complaints under this law. The purpose of this pamphlet is to help people who do not have legal training to know how the law works and to show them how to file their own complaints with the Commission if they are discriminated against because of a disability.

You will note that at various points there are numbers for footnotes. (Actually they are "end notes" at the end of the pamphlet.) You need not read these notes in order to learn what you should know about the law and what you have to do. They are put there for people who want to know the information in more detail, including lawyers and other advocates who might appreciate having these legal references and supplementary information. But the average reader can disregard the end notes and just read the text.

At the end of the pamphlet we also suggest places where you can seek further legal help if you need it. For more information about this law, even if you are not seeking a lawyer, feel free to call the organizations listed in the "Where to Get Help" section.

EXPLANATION OF BASIC LAW

There are now many laws, both state and federal, which give some protection to people with disabilities.¹ The purpose of this pamphlet, however, is to focus on the state law which will probably be of the most use to most people with disabilities who are in the job market -- officially, "An Act Prohibiting Discrimination Against Persons in Employment on Account of Physical or Mental Handicap," sometimes referred to simply as "Chapter 533."²

Perhaps the first thing you should know about Chapter 533 is that if you think you have been illegally discriminated against, you must file a complaint within six months of the discriminatory act. If the six months is almost up, go in person to the MCAD (see page 14 for where) and ask the people there to help you with the complaint. The complaint can always be changed (amended) later, if necessary. But if you miss the six month deadline, your rights are lost! (See further discussion of this on page 14.) As to what "discrimination" itself is, the most important parts of this law are in the following paragraphs, which we quote directly from the statute:

"The term 'handicap' means (a) physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment.

"The term 'major life activities' means functions, including but not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

"The term 'handicapped person' means any person who has a handicap.

"The term 'qualified handicapped person' means a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." It shall be unlawful practice:

"For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the

employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."³

In simple terms the law says that it is unlawful for an employer to discriminate against a person with a disability because of his or her disability when that person claims to be a "qualified handicapped person." A qualified handicapped person is able to do the job but may (or may not) need some help from the employer in order to do it. The employer may not discriminate against that person; and if help is needed, the employer has to give that help unless the employer can show that it would be a real strain on the business to make that accommodation.

Let's take an example.

Case Example 1

Laura is a stock room clerk, working for a big business which has several clerks who work in the stock room. The job, for most of the clerks, involves walking around and climbing ladders to check on materials on shelves and to restock and remove stuff. There are also one or two clerks who don't do much moving around but basically stay at desks and do paper work. Laura has a good work record and has had no problems with her employer.

Then Laura has an accident at home which puts her out of work for several weeks. When she's ready to return to work, she cannot stay on her feet for long periods of time. From now on she needs to have a job where she sits down most of the time. She asks her employer to give her one of the stock room desk jobs. (There is no union contract which would prevent this.) Without any significant disruption to his business, the employer would be able to switch Laura with Fred (their pay is the same), so that Fred does the job which requires moving around and

climbing step ladders, and Laura does the desk job. Fred is willing to trade jobs, but the employer refuses. Laura is fired.

Under Chapter 533 Laura has a good case against her employer, and she could file a complaint against her employer with the Massachusetts Commission Against Discrimination (MCAD), if she did so within 6 months of her firing.⁴ Let us look at her situation and see how it fits the requirements of the law.

1. The first question is whether Laura is a "handicapped person." As quoted above, the law defines a handicap as a physical or mental impairment "which substantially limits one or more major life activities" And "major life activities," under the law include "walking . . . and working." Plainly Laura's disability impairs her walking -- and it impairs her working, if she has to climb ladders continually in doing her work. She is a "handicapped" person.

2. The next question is whether she is a "qualified handicapped person." Someone is a qualified handicapped person if she can perform all of the important functions of a job, without any adjustment of duties on the employer's part, or with only minor adjustment, which is known as "reasonable accommodation." Laura is a "qualified handicapped person" because she can do the important parts of the stock clerk job if the employer would just accommodate her by reassigning some of the duties between her and Fred.

As you can see, in deciding whether an accommodation is reasonable we have to figure out how much of an effort the employer has to make. The employer must make a reasonable accommodation, but he does not have to suffer "undue hardship." The law says that in deciding this the MCAD (or a court, if the case gets to court) should consider (1) the overall size of the business, (2) the type of operation involved and (3) the nature and cost of the accommodation needed.⁵

It is obvious in Laura's case that her employer is big enough, with enough employees, so that some people do not have to be able to hop about and can sit at desks. The type of operation is also one that is sufficiently varied so there are different types of jobs or variations on jobs.

Finally the nature and cost of the accommodation involved is very simple. Laura and Fred could simply change jobs. There is no cost.

Not all accommodations are easy. If an employer, for instance, had to put in a ramp costing \$1,000, that would clearly be reasonable for a big employer (probably would be for Laura's employer), but it might not be reasonable for a little, "Mom & Pop" grocery store which had just six employees.

Similarly, if the only job were hauling coal, using a carrying bag and moving back and forth from a truck to someone's basement, the type of operation might make it very hard for an employee who is handicapped in the way Laura is to continue on the job, and the employer would have no way of reasonably accommodating her. But in Laura's case in the first example given, the accommodation is easy.

Since the employer refused to make reasonable accommodation to Laura's disability, the law protects her. She can say that she was "dismissed from employment . . . because of his [her] handicap." (Remember that it is not enough to be handicapped and to have lost a job or not been hired. The person complaining must show discrimination because of the handicap.) In Laura's case, she had a good record on the job and no trouble with her employer before her disabling accident. Even with the disability she can do the job, with reasonable accommodation. But the employer won't make that accommodation. Laura is plainly being fired because of her disability. She is being discriminated against.

There are a few other features of Chapter 533 that are worth mentioning here, even though they are not illustrated by Laura's case:

The law does not cover employers with fewer than six employees.⁶

Do minor disabilities, like a temporary cold or a broken finger qualify? Probably not, although there is not any clear Massachusetts court ruling saying so. On the other hand, if a broken finger resulted in a permanent impairment, a person with that kind of disability might not be able to continue as an operator of certain machines, and it would depend on the facts of the case as to what reasonable accommodation, if any, the employer would be expected to make.

Note that the definition of handicap means an impairment, a record of having it or being regarded as having such impairment. Sometimes people with epilepsy, diabetes, cancer, recovered alcoholism or other "hidden disabilities" are regarded as being so impaired that they cannot do fire-fighting, truck driving or other jobs. What really matters is whether they actually can do the job, not what other people may assume. Or the person may have had a problem in the past (such as mental illness, alcoholism or drug addiction). In any case, if a present or past disability does not keep the person from performing the "essential functions" of a particular job, the person may have a very solid claim against an employer who will not accommodate him or her.

Can an employer make pre-employment inquiries, that is, ask about disabilities in the hiring process? Not the way employers used to be able to do. The law has a special provision on this, which reads as follows:

"An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an

employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts."⁷

What this means is that an employer may not ask you, outright, whether you have a disability. If the employer thinks you have a disability and wonders whether it will keep you from performing the job, the employer can first offer you the job (if he thinks you are otherwise qualified) and then make that offer conditional on your passing a medical examination. The only question he can legally put to the examining physician is whether, with reasonable accommodation, you could perform the job.

Suppose you have a vision or hearing problem. The employer would like to hire you but is genuinely worried whether you can do the work because of your problem. If he says that you can have the job but you have to pass an exam designed to find out whether you can perform the job -- that's okay. If you subsequently are examined by a doctor who finds that you do indeed have an impairment but that with a slight modification of the job you ought to be able to do it,⁸ and then the employer refuses to give you the job, it is likely that the employer is refusing to make that reasonable accommodation and is in fact discriminating against you because of a disability. The law separates the job offer from the medical examination, to make clearer whether the employer is discriminating.

An employer is also allowed to ask you about whether you have a disability if the employer makes it clear that the company has an affirmative action policy in favor of hiring people with disabilities, so that if you disclose the disability you may get "a few points extra" toward the chances of your being hired because

of your disability. You do not have to answer such a question, however; it is up to you.

HOW TO FIGHT BACK

You know the basic Massachusetts law against discrimination in employment against people with disabilities. Suppose you are discriminated against -- what can you do about it?

The answer is that you can file a complaint with the Massachusetts Commission Against Discrimination, which we'll refer to from now on as the "MCAD." You need to get a proper form⁹ (from the nearest MCAD office -- see page 15), fill it out and either mail it in or, even better, bring it to the MCAD and file it in person. Shown on page 10 is a sample MCAD complaint form, filled out for the following simple case:

Case Example 2

Mary Mulligan has epilepsy. She has not had a severe (or "grand mal") seizure for nearly 1-1/2 years, because she has the epilepsy under control by regularly taking her medication. She also has a hearing impairment which is lessened by her use of a hearing aid. She recently worked as a telephone operator and receptionist. Answering an ad, she tries to get such a job with a small firm (8 employees) but is refused the job immediately. The manager, Mr. Healy, tells her that he would like to employ her, but feels that in view of her two disabilities it might just be too risky for him. He says that the calls often come fast and furiously, and he wouldn't want to have someone who "blanked out or couldn't hear what people were saying." Mary is clearly capable of performing the job. She has done the same job with her previous employer with no difficulties. Mary Mulligan tries to explain why the employer's fears are unfounded, but he refuses to listen. Mary Mulligan can file a complaint with the MCAD. Take a look at the filled out form on page 10 and then read the next paragraph.

The forms that are actually used by the MCAD do not have numbers in brackets in the various blanks on the form. We have put numbers in on the sample to help to explain how the different blanks should be filled in.

BLOCK 1.

This form is generally referred to as the "complaint form" even though the title of the document is "CHARGE OF DISCRIMINATION."¹⁰ Obviously, there is nothing for you to fill out in Block 1. It is just the title of the form.

BLOCK 2.

The agency fills this out.

BLOCK 3.

MCAD is the name of the agency with which you will file the complaint.

BLOCK 4.

Here you print clearly or type your name the name of the person who has been discriminated against and is making the complaint, that is, the "complainant." The form asks you to indicate "Mr., Ms. or Mrs." It's up to you. Indication of your sex might be useful. (One of the problems in dealing with the MCAD is that they may ask a lot of unnecessary questions!)

BLOCK 5.

Fill in your home telephone number, including area code.

BLOCK 6.

Here fill in your street address and city, state and zip code. You are asked also for your county. If you do not know your county and cannot easily find out, do not worry about it. They will probably not refuse to accept the complaint because you did not fill in the county.

MCAD EMPLOYMENT DISCRIMINATION COMPLAINT FORM

[1] CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.		ENTER CHARGE NUMBER [2] ☒ FEPA ☒ EEOC	
[3] MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and EEOC (State or local Agency, if any)			
NAME (Indicate Mr., Ms., or Mrs.) [4] Ms. Mary Lyman Mulligan		HOME TELEPHONE NO. (Include Area Code) [5] 508-455-8485	
STREET ADDRESS [6] 25 Santuit Way, Lowell, MA 01853		CITY, STATE AND ZIP CODE Middlesex	
NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)			
NAME [7] Ace Restaurant Supply, Inc.		NO. OF EMPLOYEES/MEMBERS [8] About 8	
STREET ADDRESS [10] 360 Main St., Lowell, MA 01853		TELEPHONE NUMBER (Include Area Code) [9] 508-452-9100	
NAME [11] Wilfred Healy, general manager		TELEPHONE NUMBER (Include Area Code) [12] (same as company)	
STREET ADDRESS [13] (same as company)		CITY, STATE AND ZIP CODE	
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es)) ☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ AGE ☐ RETALIATION ☒ OTHER (Specify) Handicap		[14] DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, year) [15] May 18, 1990	
THE PARTICULARS ARE (If additional space is needed, attached extra sheet(s)): [16] Complainant has epilepsy but has not had a seizure for a year and a half since she has regularly taken medication. She also has a hearing impairment but can hear almost normally by regular use of a hearing aid. Respondent, Ace Restaurant Supply, Inc., advertised an opening for an experienced telephone operator/receptionist in the <u>Lowell Sun</u> of May 16, 1990. Complainant on May 18th called respondent in answer to the ad and spoke with Wilfred Healy, the manager. He said to come right away for an interview. The job was open for immediate filling. Complainant went for the interview but was refused the job, in spite of her qualifications and experience. Mr. Healy said the calls sometimes came fast and furiously, and he did not want someone who might "blank out" or couldn't hear what people were saying. Complainant explained that she could overcome her handicaps and perform the essential functions of the job and that she had held such a job before successfully. Healy refused to discuss the matter further. Complainant requests that the Commission (1) award her back pay from May 18, 1990 to the date of the award, (2) award her money damages for emotional distress and (3) either (a) order the respondent to hire complainant as a telephone operator/receptionist or (b) award her front pay from the date of the award and for a reasonable time thereafter.			
☐ I also want this charge filed with the EEOC. [17] I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY - (When necessary to meet State and Local Requirements) [18] I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.	
I declare under penalty of perjury that the foregoing is true and correct. [20]		SIGNATURE OF COMPLAINANT [19] <i>Mary Lyman Mulligan</i> SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year) <i>I.M. True</i> Notary	
Date		Charging Party (Signature)	

BLOCK 7.

Here you put the name of the principal person or corporation who or which is complained against, known as the "respondent." If the employer is a corporation, even though the person you dealt with was, of course, an individual. You will need to find out what the name of the employer is. Make every effort to get this right. One simple way is to call the employer by phone and ask the person who answers what the formal name of the employer is. While you are on the phone you might ask about what's called for in Block 8, if you do not know the answer!

BLOCK 8.

Here put the number of employees, if you know. If you have just a rough idea put the approximate number, just as has been done in the example. (Remember that the state law applies only to businesses with 6 or more employees.)

BLOCK 9.

Here you put the phone number of the respondent named in Block 7.

BLOCK 10.

Here you put the Block 7 respondent's full address.

BLOCKS 11, 12 & 13.

These Blocks are used when your complaint is against another person or corporation as well as the one you have first named. In the sample here, Mary Mulligan names as a second respondent Wilfred Healy, the company person she dealt with. (If the business wasn't a corporation but a two-partner partnership, you might want to name both partners as respondents.)

BLOCK 14.

You will note that the form was obviously prepared at a time before discrimination against people with disabilities was against the law. Consequently you can check the "OTHER" box and then specify "Disability" or "Handicap" afterward, just as shown on the sample.

BLOCK 15.

Here you fill in the date of the most recent act of discrimination. In Mary's case that was easy -- there was a specific date, which has been filled in. If in Mary Mulligan's case she was already employed but the employer continually wouldn't promote her or discriminated in how much she was paid, because of her disability, such conduct would be a "continuing discrimination." The last time she asked to be promoted or for a raise, for instance, and was refused, would be the date filled in. (See page 14 for discussion of when complaint must be filed.)

BLOCK 16.

Here you see the details of the Mary Mulligan case have been set forth. (If you need additional space, to tell the story, just use extra sheets of regular (8 1/2 x 11 in.) paper. If you use additional pages, put your name and the date of filing at the top of each page.)

It is crucial to set forth here the essential elements of your claim: (1) that you are a person with a disability; and (2) a "qualified handicapped person;" and (3) that the employer discriminated against you because of your disability even though you could perform the essential functions of the job -- or could do so with reasonable accommodation, which the employer refused to make. Finally, you must explain (4) what your "damages" are or were, if any, and (5) what "relief" you want.

A word about "damages" and "relief." "Damages" is the lawyers' word for measuring in dollars how much you are harmed. Damages may include "back pay" -- the pay you would have gotten if you had not been discriminated against, up to the time the complaint is decided. "Front pay" is the pay the Commission (or a court) should award you from the date of the decision forward, for a reasonable time, if you are not hired after the decision. The MCAD also awards complainants money for "emotional distress" -- the psychological pain and suffering caused by the discrimination.

"Relief" is what the Commission can order the employer to do or not to do. It includes awards for damages, noted above. The Commission may also order the respondent to hire, or hire back ("reinstate"), promote or raise the pay of the complainant.

BLOCK 17.

This is for those people who want a case filed with the federal Equal Employment Opportunity Commission. It does not apply to discrimination cases filed with the MCAD under Chapter 533 for discrimination because of a handicap. If the employer has fifteen employees or more or receives money from the federal government, you may have a claim under the Americans with Disabilities Act or the Rehabilitation Act of 1973, as amended. If so, the answer to this question should be "Yes."

BLOCK 18.

Nothing is done in this block -- it just announces what will follow.

BLOCK 19.

Here, as shown, the complainant signs as does a Notary Public. The Notary has the complainant swear or affirm that she has read the complaint and that it is true to the best of her knowledge and belief. Note that either the complainant or the Notary also puts down the date.

How does one find a Notary? They're all over the place, even though only a handful are listed in the telephone book yellow pages (and most of these probably charge a fee). Many banks and large businesses have Notaries. Just about every law office has a Notary, including the Legal Services Offices referred to and the other organizations listed at the end of this pamphlet. Notaries there will not charge. The only requirements are that the person swearing or affirming to the complainant must appear personally before a Notary, identify herself and swear or affirm that the things said in the complaint are true.

Block 20.

This Block is theoretically for when you do not have a Notary handy. But you should not use it because the Commission's practice is to insist that complaints be notarized. See the explanation above about how to find a Notary.

WHEN THE COMPLAINT MUST BE FILED

Complaints with the MCAD must be filed within 6 months of the last act of discrimination.¹¹ This is extremely important and means that you have no more than 6 months from the date the discrimination occurred to get your completed complaint form filed in the MCAD office. If yours is a case of continuing discrimination, and the last act was more than 6 months ago, you should do something to get the employer to act again to discriminate -- go ask him again to promote you and have him refuse -- then you have a new act of discrimination that is recent, and you can fill in that recent date on Block 15 of the form.

The law contains another deadline or "statute of limitations." If you wish to bring your case to court (the Superior Court), you must file it in court within 3 years of the last act of discrimination.¹² That is, even if you filed your case with the MCAD within 6 months of the last act of discrimination, if you wish to bring the case to court, you must file the case again, in court, within 3 years of the last act of discrimination. Sometimes the MCAD takes a very long time to process a case -- much longer than 3 years. If you lose confidence that the MCAD will ever reach the right result in your case, it may be wise to take the case to court.

If you decide to go to court, you will need to consult a lawyer. Be sure to do so well before the 3 years are up. (See the section on where to get help at the end of this pamphlet, page 18.)

There is one other time limitation you should know about. A person may bring her case to court, even though it was properly begun at the MCAD, any time after 90 days from the date it was

filed with the MCAD. A complainant may also take the case to court before the 90 days have gone by, with the MCAD's written permission.¹³

WHERE IS THE MCAD LOCATED?

The MCAD has 2 offices where a complaint may be filed in person or by mail. They are at the following places:

Boston

One Ashburton Place, Suite 601

Boston, MA 02108

(617) 727-3990

Springfield

436 Dwight Street, Suite 220

Springfield, MA 01103

(413) 739-2145 or (413) 739-3330

DEALING WITH THE MCAD

While you may file your complaint with the MCAD by mail, it is best to take it in yourself. It is also wise to keep a copy of your complaint. If you do file the complaint in person, have the MCAD date-stamp your copy of the complaint, especially if you are concerned about the 6 month deadline. Complaints have been lost, once filed; and an MCAD date-stamped copy can be proof of when you filed.

Be sure also to keep careful notes of your conversations with your (prospective) employer or others involved in your case, noting names, dates, times and other important details.

It is important to try to get the MCAD interested in your case, right from the beginning. A good way to start, after getting your complaint ready to file, is to dress neatly and go to the MCAD early in the day. The person who sits down with you to go over the complaint will probably be the Investigator of the complaint, and he or she may well be the most important person involved in

your case from then on. Try to be helpful, such as by telling the Investigator about a relevant company personnel policy or suggesting witnesses who can confirm your story, supplying their addresses and phone numbers. Be forthright and friendly, and be sure to be responsive to any questions you may be asked.

Investigators should be helpful and ask you only relevant and important questions. Sometimes Investigators are not helpful and are even hostile. Grin and bear it while you are there! (You may wish to make a note of hostile treatment. If you do, get the person's last name and bring any instances of this to the attention of one or the other of the two organizations listed at the very end of this pamphlet. They may also be able to help you with your case, even if they cannot represent you.)

After the initial interview it may make sense to check in with the Investigator from time to time to see how the investigation is proceeding and whether you can help in any way. Experience shows that a complainant who, with tact but persistence, keeps the Investigator on his or her toes, is likely to be better served.

Note that the MCAD law protects complainants and witnesses from retaliation. If you think an employer is threatening or harassing you because you filed a complaint -- or because you gave favorable testimony in support of someone else's MCAD complaint -- you should immediately tell an appropriate MCAD official. You may even wish to file a complaint with the MCAD about this harassment.¹⁴

MCAD PROCESSING

The MCAD procedure for processing a complaint is rather complicated. Basically the Investigator should talk to you and then demand documents and/or talk to representatives of the respondent. There may be a "Fact Finding Conference," to which you will be invited and where you may bring a lawyer (or other representative of your choice) and witnesses. Your lawyer is

generally not allowed to speak (except quietly to you) at this conference.

The first hurdle to get over is a finding of "probable cause" by the Investigator and, officially, by the "Investigating Commissioner." You have to be able to present enough evidence, through your own testimony or someone else's, to convince the Investigator that your story is believable and that it satisfies the legal requirements of a discrimination complaint under Chapter 533.¹⁵

If probable cause is found and the employer is unwilling to settle the case at that point, the case will go to a formal hearing before a "Hearing Commissioner." Before the case goes to a formal hearing, you will have to "waive" (or give up) your right to file a complaint in court.¹⁶ (See discussion of filing in court, on page 14.) An MCAD lawyer will represent you at the MCAD hearing. If you win this round and the respondent still fights it, there may then be another hearing before the full Commission (consisting of 3 Commissioners).

If probable cause is not found, that is, a lack of probable cause ("LOPC") finding issued, you must appeal this within 10 days.¹⁷ The appeal is heard by a single Commissioner. It is an informal hearing. At it, you should try to convince the Commissioner that the LOPC finding was wrong, because the case was inadequately investigated, etc.

If you lose the case by a finding of LOPC, you may still have the remedy of going to court, as long as you file your case in court within 3 years of the date of the last act of discrimination. It is wise to get a lawyer if you think you must go to court.

Assuming you get a finding of probable cause and you win after any hearings (for instance, before the hearing Commissioner and possibly then before the full Commission), the Commission may award you both money damages for back pay and emotional

distress and reinstatement, promotion or whatever you are claiming, including seniority, pension or other benefits you would have received when you should have been hired, promoted or whatever.

At any point along this process the case may be "settled," that is, ended by agreement of the parties and with the approval of the Commission or one of its authorized representatives. Cases are settled generally for something less than what the complainant is asking. The theory is that she has to give something up in order to settle the case without the hassle of further litigation.

Sometimes a bird in the hand can look a lot better than two birds in the bush; but it is wise to check with a trusted friend or advisor (including "your" MCAD lawyer, if one is assigned) before agreeing to a settlement, especially once the Commission has found probable cause.

WHERE TO GET HELP

If you just want advice or help with preparing your complaint but you do not need a lawyer, contact the Massachusetts Office on Disability (MOD), One Ashburton Place, Room 1305, Boston, MA 02108 (1 [800] 322-2020 or in Greater Boston [617] 727-7440 (Voice and TDD)).

If MOD is unable to help you, or you feel you really need a lawyer and you do not know a qualified lawyer, but you can afford a lawyer, call the lawyer referral service of the Massachusetts Chapter of the National Lawyers Guild, 14 Beacon St., Boston, MA 02108 [617] 227-7008 (Voice only), or the referral service of the bar association of your city or county. If you are unsure how to get to that service, contact the Lawyer Referral Service of the Massachusetts Bar Association, 20 West St., Boston MA 02111 [617] 542-9103 (Voice only).

If you cannot afford a private lawyer and would like a referral to the appropriate legal aid or Legal Services program, contact the Legal Advocacy and Resource Center, 16 Beacon St., Boston, MA 02108 (617-742-9197 Voice only). You may also contact

one of the two organizations which worked in developing and helping to pass chapter 533 and which have a continuing interest in the law's efficient and just administration. These organizations are also available to give technical assistance to lawyers and advocates working on these matters and have produced a "Practice Memo" on Chapter 533 for lawyers and advocates. They are:

Disability Law Center
11 Beacon St., Suite 925
Boston, MA 02108
617-723-8455 Voice and TDD

Massachusetts Law Reform Institute
99 Chauncy St.
Boston, MA 02111
617-357-0700 Voice or TDD

Good luck!

END NOTES

(1) There are many laws, both state and federal, protecting people with disabilities. Some of them are mentioned here.

■ Historically, the most important laws are Sections 503 and 504 of the federal Rehabilitation Act of 1973, which are now found in Title 29 of the United States Code (the federal codified statutes), Sections 793 and 794. Section 503 prohibits discrimination in employment by those who have contracts with the federal government for over \$2,500. Section 504 prohibits discrimination in any governmental program or activity receiving federal financial support.

■ In 1980, the voters adopted Article 114 of the Amendments to the Massachusetts Constitution, which, following the language of Section 504, provides that --

"No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the Commonwealth."

- In 1988, Congress passed the Fair Housing Amendments Act, extending protections under the Fair Housing Act to people with disabilities and families with children.
- In early 1990, Governor Dukakis signed into law Chapter 722 of the Acts of 1989 which conforms state law to the federal Fair Housing Amendments Act of 1988, prohibiting discrimination against people with disabilities in housing. It gives the MCAD enforcement authority, makes the Architectural Access Law apply to housing, sets up a state clearing house for accessible housing, etc.
- There are also federal and state statutes prohibiting "architectural barriers" to persons with physical or communications disabilities -- the federal Architectural and Transportation Barriers Compliance Board Act, 29 U.S.C. Section 792, establishing the board with power to enforce standards to U.S.C. Section 4152 and following; and the state Architectural Access Board Act, General Laws, Chapter 22, Section 13A.
- Another important law is the federal Individuals with Disabilities Education Act (IDEA), Public Law 94-142, now found in Title 20 U.S. Code Sections 1401 and following. It was modeled, in part, on the stronger Massachusetts statute, Chapter 766 of the Acts of 1972, now found in Chapter 71B of the Massachusetts codified statutes, the General Laws. These laws give every child with a disability (up to age 22) the right to a public education appropriate to his or her special needs.
- The federal Americans with Disabilities Act became law in 1990. Public Law 101-336, now found at 42 U.S. Code 12,101. It prohibits disability-based discrimination nationally, regardless of federal financial involvement, in employment, transportation, public accommodations, state and local government activities and telecommunication services.

■ Massachusetts also has a fairly comprehensive Governor's Executive Order, No. 246, requiring non-discrimination and affirmative action with respect to persons with disabilities in employment, licensing and most other aspects of state government.

(2) The statute was passed as the 533rd bill signed into law by the Governor in 1983, so it became Chapter 533 of the Acts of 1983. It changed the Massachusetts General Laws (the codified laws of this state, that is, the laws as organized by subject matter) in the part that creates and prescribes the powers and duties of the Massachusetts Commission Against Discrimination ("the MCAD"), Chapter 151B. Many people refer to the law simply as "Chapter 533."

(3) The first three paragraphs come from the definition section of General Laws (abbreviated as "G.L.") Chapter (abbreviated as "c.") 151B, Section (for which lawyers often use the symbol "§") 1 -- namely, sub-sections 17, 19 and 16. The final, big, substantive paragraph is G.L. c. 151B § 4, subsection 16, 1st paragraph. These paragraphs were all inserted in the codified law by different sections of c. 533.

(4) Laura also has a good case for unemployment compensation benefits and may file a claim with the Department of Employment and Training under G.L. c. 151A § 39.

(5) G.L. c. 151B § 4-16, 2d para.

(6) G.L. c. 151 § 1-5.

(7) G.L. c. 151B § 4-16, 4th para.

(8) If the physician is sympathetic, ask him or her to specify the accommodation in the report.

(9) Neither the statute nor the regulations require the use of a special form, as long as you give the essential information. But you are more likely to get the complaint filed without fuss if the Intake Worker sees it on the MCAD "Charge of Discrimination" form.

(10) Because there are federal anti-discrimination laws as well and a complicated relationship between the MCAD and some of the federal agencies, Massachusetts uses a form which was composed by the federal Equal Employment Opportunity Commission.

(11) G.L. c. 151B, § 5, 2d para., next-to-last sentence.

(12) G.L. c. 151B § 9, 3rd para., last sentence.

(13) G.L. c. 151B § 9, 2d para., first sentence.

(14) G.L. c. 151B § 4-4. It appears that a retaliation claim may be sustained if the complainant in good faith felt retaliated against. See, *Rosario v. City of Holyoke*, 1 MDLR 1079 (1974).

(15) According to the MCAD's Regulations -- "A finding of Probable Cause shall be made when, after appropriate investigation, the Investigating Commissioner concludes that there is sufficient evidence upon which a fact-finder could form a reasonable belief that the respondent committed an unlawful practice. In making this determination, disputes involving genuine issues of material fact are to be reserved for determination at a hearing." 804 C.M.R. § 1.13(7)(a). ("C.M.R." stands for Code of Massachusetts Regulations.) Besides procedural Regulations the MCAD has a document of "Guidelines -- Employment Discrimination on the Basis of Handicap," adopted by the Commission on 9/30/86.

(16) 804 C.M.R. § 1.13(2)(d), last sentence. This requirement was approved in *Brunson v. Wall*, 405 Mass. 446, 452-53 (1989).

(17) 804 C.M.R. § 1.13(7)(d), first sentence.

